DATE: March 10, 1998

CASE NO: 97-STA-00030

In the Matter of

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH

Prosecuting Party

and

ANTHONY CIOTTI

Complainant

v.

SYSCO FOODS OF PHILADELPHIA

Respondent

Appearances:

Andrea A. Appel, Esq.
For Prosecuting Party

Edward S. Mazurek, Esq.
For Respondent

Before: RALPH A. ROMANO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provision of the Surface Transportation Assistance Act, hereinafter the "Act", 49 U.S.C. § 31105 (1982); which prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities.

Complainant filed his complaint on May 14, 1997, and on July 18, 1997, the Occupational Safety and Health Administration of the U. S. Department of Labor issued its investigative findings to the effect that the complaint had merit (ALJ 1).[1]

Complainant requested a hearing on August 14, 1997 (ALJ 2) and an initial notice of hearing was issued on August 25, 1997 (ALJ 3) upon the August 22, 1997 assignment of this case to the undersigned. After one continuance (ALJ 6)[2] the matter was tried on January 12, 1998 in Philadelphia, Pennsylvania. Briefs were filed by February 27, 1998.

THE LAW

49 U.S.C. §31105. Employee protections

> (a) Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment,
> because -
>
> * * * * * *
>
> (B) the employee refuses to operate a vehicle because -
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;
>
> * * * * *

49 C.F.R. Part 392.3 reads, in pertinent part,:

> No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, and/or another other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.

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[1] References to the record are: "ALJ" - Administrative Law Judge exhibits; "G" - Government exhibits; "RX" - Respondent's exhibits; "Tr." - transcript of trial.

[2] A second motion to continue the trial was denied (ALJ 8).

Prosecuting Party argues that Respondent violated Section (a)(1)(B)(i) of the Act in suspending Complainant for one day, May 14, 1997, from its employ. An award for one day pay plus interest is sought.

ISSUES

The issues are:

1. Whether the claim is time-barred under 49 U.S.C. §31105(b) of the Act.

2. Whether Respondent suspended Complainant in violation of the Act.

SUMMARY OF THE EVIDENCE

Complainant testified that he has worked for Respondent, a food distribution company maintaining an office in Philadelphia, Pennsylvania, as a truck driver and delivery person since August 1991. (Tr. 19-20). During the course of his employment with Respondent, Complainant regularly drives commercial straight trucks and commercial tractor-trailer combinations with gross vehicle weights of approximately 30,000 pounds which are filled with product in Pennsylvania and then emptied through deliveries to Delaware or New Jersey (Tr. 22; 84-5). During the relevant period of May, 1997, Complainant normally worked for Respondent between ten and twelve hours per day, five days per week, at the rate of $15.21 per hour plus benefits or a total of $27.47 per hour (Tr. 22-24). On Wednesday, April 23, 1997, Complainant reported for work at Respondent at 6:00 a.m. as scheduled (Tr. 26), and was assigned to drive a truck for sixteen delivery stops throughout New Jersey (Tr. 27, 28). At or about 9:00 a.m. on that day Complainant began to feel ill (Tr. 28-29), and at or about noon, upon his arrival at the sixth delivery stop, he began to feel very ill with symptoms including queasiness in his stomach, and increasing nausea which required frequent trips to the bathroom (Tr. 28, 29). Upon his arrival at this stop, he telephoned one of Respondent's Driver Supervisors and informed him that he was unsure whether he could continue to drive the delivery truck and make his deliveries safely in light of the way he was feeling (Tr. 29-30). Respondent's Driver Supervisor responded to this telephone call by noting that Complainant should do the best he could and let the office know how he was progressing (Tr. 30). After completion of the sixth delivery, he was unable to re-position the ramp on the delivery truck and once again telephoned Respondent's Driver Supervisors to request mechanical service (Tr. 30-31), and later again called and repeated that he was not feeling well (Tr. 31). While waiting at the sixth stop for the repairman to arrive and repair the truck, his symptoms worsened in that he made three trips to the bathroom, and his queasiness, nausea and weakness were increasing to the point that he realized he could no longer continue both delivering the product and driving the delivery truck safely (Tr. 31). Later, he telephoned a third time and spoke with Respondent's Transportation Supervisor to let him know that, in fact, he was

unable to continue in his normal delivery manner and Respondent would have to send somebody to either relieve him or help him with his deliveries (Tr. 31-32). Milton Hernandez, one of Respondent's Driver Supervisors, later arrived at the sixth stop to assist Complainant with his remaining ten deliveries (Tr. 32). For stops seven through fifteen, Complainant continued to drive the truck while Mr. Hernandez followed in Respondent's minivan (Tr. 33), and unloaded the product at each of the delivery stops while Complainant was in the bathroom most of the time (Tr. 33). Upon arrival at the sixteenth delivery stop he realized that, due to his physical condition and the fact that it was now dark, it would be dangerous for him to continue driving the truck (Tr. 33-34). He then suggested to Mr. Hernandez that he drive the minivan, rather than the truck, back to the distribution center, a distance of approximately eight miles (Tr. 34). He felt capable of driving the minivan because it was much smaller than the delivery truck, weighed less, was easier to handle, keep on the highway and it had an automatic transmission (Tr. 34). He drove the minivan back to the distribution center and informed one of Respondent's Driver Supervisors that he was feeling ill and was going home (Tr. 35). At approximately 11:00 p.m. that day, he realized that he was feeling even worse physically and telephone Respondent's nighttime Driver Supervisor and Router, to inform him that, because he was sick, he would not be able to drive the company delivery truck safely or deliver the product the next day, April 24, 1997, as scheduled (Tr. 36-37). On the morning of Thursday, April 24, 1997, he realized that his physical condition had not improved to the point that he could drive Respondent's delivery truck safely so he did not report to work (Tr. 37), and at or around 12:00 p.m. he was examined by his family physician, Joan Hurlock, M.D. (Tr. 37, 40), who diagnosed Influenza (Tr. 42), and provided him with a return to work order stating that he was under her care and not to return to work until Monday, April 28, 1997 (Tr. 43-45), which he understood as directing him not to return to work until April 28 because it would be unsafe for him to operate heavy machinery in his condition (Tr. 45). At or around 2:00 p.m. on Thursday, April 24, 1997, he telephoned Respondent's Driver Supervisors to report that he would not be reporting to work on Friday, April 25, 1997 (Tr. 46) because he was too ill to drive Respondent's delivery truck safely, and he did not report to work for Respondent on Friday, April 25, 1997 (Tr. 47). He was not scheduled to work for Respondent on Saturday, April 26 or Sunday, April 27, 1997, but did report for work on Monday, April 28, 1997 (Tr. 47). On April 30, 1997, he received a letter from Garren Lisicki, Respondent's Director of Transportation, stating that he was being suspended for one day (May 14, 1997) for his absence from work on April 24-25, 1997 (Tr. 48, 53; G- 1).

Milton Hernandez testified on behalf of Respondent, and generally corroborated Complainant's testimony as above (Tr. 75-82), except: that Complainant told him he had twice vomited on April 23, 1997 (Tr. 76-78), (whereas Complainant had testified at trial previously that he had not vomited at all that day) (Tr. 62), and that Complainant did not appear sick to him (Tr. 79).

Charles Munn, Respondent's Vice President of Employee Relations, testified as to Respondent's business practices, and explained its attendance disciplinary policy (G-2), which was implemented in the context of the collective bargaining agreement between Respondent and Complainant's union (Tr. 83-110; RX 1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under the burdens of proof and production in "whistleblower" proceedings, Complainant must first make a prima facie showing that protected activity motivated Respondent's decision to take an adverse employment action. Respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, non-discriminatory reason. Complainant must then establish that the reason proffered by Respondent is pretextual. At all times, Complainant has the burden of establishing that the real reason for his discharge was discriminatory. St. Mary's Honor Center v. Hicks,, 113 S.Ct. 2742 (1993); Thomas v. Arizona Public Service, Co., Case No. 89-ERA-19, Sec. Dec., Sept. 17, 1993, slip op. at 20.

In order to establish a prima facie case, a complainant must show that: (1) he engaged in protected conduct; (2) the employer was aware of that conduct; and (3) the employer took some adverse action against him. Carroll v. Bechtel Power Corp., Case No. 91-ERA-0046, Sec.Dec., Feb. 14, 1995, slip op. At 9, citing Dartey v. Zack Co. Of Chicago, Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1983, slip op. At 7-8. Additionally, the complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Id. See also Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th cir. 1984); McCuistion v. TVA, Case No. 89-ERA-6, Sec. Dec., Nov. 13, 1991, slip op. At 5-6. This inference of causation can be raised by the temporal proximity between the protected activity and the adverse action. Zessin v. ASAP Express, Inc., Case No. 92-STA-33, Sec. Dec., Jan. 19, 1993, slip op. at 13; Bergeron v. Aulenback Transp., Inc., 91-STA-38, Sec. Dec., Jun. 4, 1992, slip op. at 3. Williams v. Southern Coaches, Case No. 94-STA-44, Sec. Dec. Sept. 11, 1995.

I
TIMELY FILING

Respondent moves to dismiss this case on the ground that the Government's Findings and Preliminary Order (ALJ 1) were filed in excess of the post sixty (60) day complaint filing limit provided at 49 U.S.C. §31105(b)(2)(A). This motion is **DENIED.** Roadway Express, Inc. v. Sectry Labor, 929 F.2d 1060 (5th Cir., 1991); Passaic Valley

Sewerage Comm. V. U.S. Dept. Labor, 992 F.2d 474 (3rd Cir., 1993); 29 C.F.R. 1978.114.

II
VIOLATION OF ACT
A.

The controversy in this case should have been put to rest in 1991 by the Secretary of Labor decision in Asst. Sectr'y & Curless v. Thomas Sysco Food Svc., 91-STA-12 (9/3/91).[3] The facts there are strikingly similar to those in this case, and even the attendance policy and employer name there resemble the policy and employer name here! Respondent does not offer the courtesy of referencing this decision, but does, by footnote,[4], suggests that the law in Curless is no longer viable by reason of the (post Curless) 1993 U.S. Supreme Court ruling in Hazen Paper Co. V. Biggins, 507 U.S. 604, the 1996 First Circuit decision in Blackie v. State of Maine, 75 F.3d 716, and various other decisions.[5] These cases involve anti-discrimination statutes other than the Act (ADEA, FLSA, Pregnancy Discrimination Act, etc.), and Respondent urges that the holdings in these decisions may, by analogy, be applied in the subject case to establish Complainant's failure to present a prima facie case. More specifically, Respondent argues that Complainant has failed to show either engagement in protected activity or causality between such activity and the adverse employment action (one-day suspension) taken against him. Essentially, these decisions teach that an employer is not necessarily guilty of discrimination where the adverse employment action is motivated by a factor entirely distinct in nature from the feature, trait or event sought to be protected by the particular anti-discrimination statute involved. In Hazen, the court held that an employer does not necessarily discriminate on the basis of age where it is shown only that it interfered with pension rights. Where the focus of the employer in taking the adverse action was upon the employee's years in service[6] rather than the employee's age, and since years in service and age are "analytically distinct", the trait (age) sought to be protected under ADEA is not the object of the adverse action and the employer cannot be said to have taken age-based discriminatory action. In Blackie, an employer was found to have legitimately reacted, through the exercise of its best business judgment, to the successful outcome of an employee's lawsuit wherein protected activity was asserted. Absent a showing that this successful lawsuit

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[3] Remanded for vacature of Sect'rys order only on basis of mootness. Thos. Sysco Food Svcs. V. Martin, 983 F.2d 60 (6th Cir. 1993). See also Self v. Carolina Freight Carriers Corp., 91-STA-25, (8/6/92).

[4] Pg. 6. Resp. Br., ftn 3.

[5] Rhett v. Carnegie Center Assocs., 129 F.3d 290 (3rd Cir., 1997); Hypes v. First Commerce Corp., No. 96-31133, 1998 WL 30239 (5th Cir. 2/12/98).

[6] Or pension status, resulting in a possible interference with pension rights contrary to ERISA (Employee Retirement Income Security Act of 1974).

motivated employer's adverse action, no illegal retaliation was established. In Rhett, the showing of adverse action due to work absences, even where such absences resulted from the state of pregnancy, does not, in itself, establish pregnancy-based discrimination. Hypes follows the same line of reasoning where a state of disability caused the work absences.

Respondent argues that since its adverse action here was motivated alone by Complainant's work absence (excessive, under its policy), no adverse employment action based upon a refusal to drive due to illness[7] ever ensued.[8] Thus, neither protected activity (refusal to drive while ill) nor causality (adverse action due to that protected activity) is established. But, Complainant's work absence cannot be considered "analytically distinct" from a refusal to drive while ill because the regulation directing him not to drive when ill transforms such work absence into a refusal.[9] Since Complainant's work absence is mandated where he is ill, that (passive) absence is indistinguishable and inseparable from a (wilful-active) refusal to operate a vehicle. While work absence is not always the result of the trait of pregnancy or disability[10], an illness work absence (here) is always the result of a behavioral refusal to drive while ill because the law directs non-appearance at work when too ill to operate a vehicle. Put another way, as one is required, by law, to absent oneself from work when ill[11], under the Act, one has refused to operate a vehicle upon that work absence (whereas one is not always required to be absent from work when pregnant or disabled).[12] Complainant's work absence is his refusal to operate while ill. Because the law forbids driving while ill, the assertion of illness, the assertion of inability to drive due to illness,

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[7] Under 49 C.F.R. 392.3 (supra)

[8] Complainant was suspended, per Respondent, for his non-appearance at work, and not for any refusal to drive when ill.

[9] Accordingly, while an employer may take adverse employment action for excessive absenteeism without necessarily frustrating, for example, the Congressional objective of eliminating the unjust stigma attached to the trait of pregnancy, an employer, as here, may not, without violating the Act, take such action without frustrating the Congressional objective of protecting the public from the danger of drivers who drive ill.

[10] As pension status is not always or exclusively related to age, and as a successful lawsuit does not always result in a retaliatory response.

[11] That is, in the present context, a truck driver is by law required not to drive when ill.

[12] Because not all pregnant or disabled persons need be absent from work due to that state of pregnancy or disability, does not mean that not all truck drivers who are ill need be absent from work due to that illness. They do need to be absent, as a matter of law.

is the refusal to drive due to illness.

I find that Complainant has established engagement in the protected activity of refusal to drive while ill by his very showing of an illness work absence, in and of itself. Since Respondent admittedly suspended him for his work absence (excessive, and thus violative of its absenteeism policy), the suspension was caused by his protected activity. A prima facie case of violation of the Act has been shown.

B.

Respondent additionally argues that Complainant was really not ill on the day of absence in question which triggered the suspension, and, accordingly he should not prevail. But, Respondent did not suspend Complainant because he was not really ill, or because Respondent did not believe his assertion of illness! Respondent admittedly suspended Complainant because he was absent "excessively" in violation of its policy.[13] Had Respondent's suspension taken the form of basing its decision on its disbelief of Complainant's alleged illness (vs. the G-1 letter of suspension founded on excessive absenteeism), no violation of the Act would have been involved. Moreover, the regulatory dictate is that a driver shall not operate a vehicle "...while the driver's ability or alertness is so impaired...through...illness...as to make it unsafe for him...to operate the...vehicle" (49 C.F.R. 392.3, supra). That regulatory dictate is not qualified so as to provide that such "ability...alertness...impair[ment]...illness..." be of a nature or degree such as is, in some fashion, acceptable to his employer, no less qualified by a nature or degree comparable to any objective measure or standard. Indeed, by reason of Respondent's specific profession of this stated reason for suspension, all evidence offered by it designed to show that Complainant was "not ill", is thereby rendered not relevant in this case.

C.

Finally, Respondent argues that Complainant should not prevail because he has failed to establish that Respondent's stated reason for the suspension was either false or pretextual. But, Complainant is required to demonstrate falsity and/or pretext only where his prima facie case of discrimination is rebutted. Texas Dept. Of Community Affairs v. Burdine, 450 U.S. 248 (1981). And, Respondent has offered, on its (rebuttal) burden of production that its adverse action was for a legitimate non-discriminatory reason, only that it suspended Complainant because Complainant violated its absentee policy, which has hereinbefore been found discriminatory under the Act. Thus, Complainant's prima facie case is not rebutted, and Complainant need not prove that the reason for suspension was either false or pretextual.

[13] See also Tr. 108-9.

Noted here is that to the extent Respondent seriously urges that its absentee policy is in any way specially protected or validated because it was implemented in the context of a collective bargaining agreement (RX 1), or that it cannot be found to have violated the Act without a showing of intentional discriminatory retaliation, those arguments are rejected. Barrentine v. Arkansas - Best Freight Sys., 450 U.S. 728 (1981); Metropolitan Edison Co. V. NLRB, 103 S.Ct. 1467 (1983). Roadway Express, Inc. v. Sect'ry of Labor, supra; Self, supra.

It is also noted that abundant evidence has been here presented to establish that Respondent's absentee disciplinary policy is eminently appropriate for its business purpose of assuring a certain level of work attendance, and enhancing its competitive position in the marketplace. As hereinafter explained, however, this policy and its objective of assuring regular and predictable job attendance, while altogether sensible in terms of advancing Respondent's business interests, cannot over-ride the paramount government interest in protecting the public safety.[14]

RECOMMENDED ORDER

On the basis of the foregoing, I find that Respondent has violated the Act in its suspension of Complainant, and, accordingly:

1) Respondent shall pay Complainant back pay of $302.17, plus statutory interest (Tr. 22-24; G-3), and

2) Respondent shall expunge from Complainant's personnel file the April 30, 1997 letter of suspension (G-1).

RALPH A. ROMANO
Administrative Law Judge

Camden, New Jersey

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Administrative Review Board, U. S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Administrative Review Board has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).

[14] While not evident specifically in this record, the spectre of such a policy serving as a motivation for, or encouragement to, a driver's risking unsafe operation in the face of, and to avoid, impending sanction for absenteeism, is by no means remote or unrealistic.